

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC

In the matter of:)	
)	MM Docket-99-25
Creation of a Low Power Radio Service)	
Amendment of Service and Eligibility Rules)	MB Docket 07-172
or FM Broadcast Translator Stations)	RM-11338
)	

REPLY COMMENTS OF COMMON FREQUENCY

Common Frequency, Inc. (“CFI”), a nonprofit 503(c)(3) California corporation that exists to advocate for, assist, and educate new community, student, and alternative non-commercial, educational applicants here submits a reply comment concerning the *Third Further Notice of Proposed Rule Making* concerning MM Dockets 99-25/MB Docket 07-172 (“FNPRM”).

I. INTRODUCTION

In this reply comment, CFI responds to two comments filed regarding the FNPRM from National Public Radio, Inc (“NPR”), and The National Association of Broadcasters (“NAB”).

II. COMMENTS OF NAB

A. NAB Comment Regarding “The Universe of FM Translators Available to AM Radio Stations Should be Expanded”¹

Within the FNPRM, the FCC has asked whether to remove the limit on cross-service translators (AM re-broadcasted on FM) with respect to the pending FM

¹ See NAB Comment, “I” page 2.

translators granted after May 1, 2009.² NAB supports a proposal for more FM translators to be made available to AM licensees.³ NAB touts the added localism presented by AM broadcasters simulcasting on FM translators. However, one has to ask: *What is superior about granting a commercial broadcaster another radio channel, over granting a non-commercial LPFM broadcaster that same radio channel for a chance to create a hyper-local forum that by far exceeds the localism any commercial broadcaster could provide to any sub-community within a city?* First, AM stations rebroadcasting over FM could be considered redundant—a poor usage of limited bandwidth—if executed improperly. Second, the FCC could be forgoing diversity of ownership for incumbent broadcasters—preferencing commercial voices over new noncommercial voices. Third, the process itself of offering AM broadcasters FM channels has artificially inflated the prices of translators, and has created a lucrative marketplace for traffickers.

CFI would like to draw attention to the following points: (1) AM rebroadcasting on translators was not allowed as of the Auction No. 83 filing window back in 2003. That means any AM station wanting a translator via the cancellation of the May 1, 2009 restriction is going to have to buy that translator via a trafficker. (2) The Commission has asked for comments “on processing policies to deter the potential for speculative abuses among the remaining translator applicants” in their quest for the “Prevention of Trafficking”.⁴ Therefore, a major goal of the FNPRM is to discourage translator assignment. In conclusion, why would the Commission support a policy that pours

² See FNPRM, para. 35: “In 2009, the Commission authorized the use of FM translators with licenses or permits in effect as of May 1, 2009, to rebroadcast the signal of a local AM station. The limitation of cross-service translator usage to already-authorized FM translators was adopted with the intention of preserving opportunities for future LPFM licensing.”

³ NAB Comment, starting on page 2.

⁴ FNPRM, para. 32-34.

gasoline on the fire of possible trafficking abuses? The Commission is asking how to starve the rats in one part of the FNPRM, and then in another part of the FNPRM, is asking if it should dump fresh meat into their troughs.

CFI believes no applicant should be granted a translator for the sole purpose of speculation. Lifting the May 1, 2009 restriction could be perceived as granting implicit permission for a translator resale market for AM-fed translators. CFI believes that if an AM broadcaster wants a translator, the best approach is to apply directly for that translator. In addition, CFI contends that AM licensee usage of translators needs to be somewhat narrow in scope because there are not enough FM channels available for both urban LPFM stations and urban translators for every AM station. Therefore local ownership, amount of local programming, diversity of ownership, and whether or not the licensee also owns an FM station in the market should be taken into consideration. Additionally, FM translator usage by AM licensees should only be used to correct impacted AM coverage areas, and not simply to create an FM counterpart in the market for the AM station. Everyone with a car stereo nowadays has both AM and FM availability.

B. NAB Comment Regarding “Arbitron Metro Markets Assess the Availability of LPFM Opportunities More Accurately than the Center-City Grid Employed in the Proposal”⁵

CFI believes NAB seeks to dilute the practicality of the current study scope (30 x 30 grid) concerning the Commission’s “channel floor” translator processing plan.⁶ Instead of the 30 x 30 grid area, NAB prescribes using the *Arbitron metro area* simply

⁵ NAB Comment, “A” page 9.

⁶ FNPRM, para. 26.

because it has been historically used for market delineation.⁷ The suggestion casts aside all technical reason for using a 30 x 30 grid in favor of the simple historical symmetry of using Arbitron boundaries. In doing so, the NAB overlooks all reasons why Arbitron boundaries are not suitable in this case:

- 1) **Arbitron boundaries scale to the coverage of commercial full power radio stations (up to 92 km radius). Such area is irrelevant to LPFM service, which deals in terms of neighborhood coverage (5.6 km radius):** Arbitron markets are based upon counties or county parts, including commuter areas. LPFM coverage is relevant mainly to city population coverage. If one were simply to calculate the number of hypothetical LPFM facilities available in an Arbitron market area, the facilities would chiefly be concentrated in no/minimal population areas (in addition, rural-zone commuter areas, as contained in the Arbitron market, which in itself—without residential population—is not relevant to LPFM). The significance of this number would have no applicable usage in estimating open channels available to market population areas. The significance of the metro study area is explicitly stated by the FCC in the FNPRM:

The grid is not intended to approximate radio market boundaries. Rather, this methodology is designed to identify “core” market locations that could serve significant populations.⁸ [underline added for emphasis]

- 2) **The rationale for “core” market population and not “Arbitron” is rooted in suitability according to the definition of *translator service*.** NAB defines the usage of a translator within its comment:

⁷ NAB Comment, p 11 “The Commission itself has endorsed Arbitron’s radio market definitions as a reasonable market delineation within which radio stations compete.”

⁸ FNPRM, Appendix A, page 19.

Translators help full-power stations serve “areas in which direct reception of signals from FM broadcast stations is unsatisfactory due to distance or intervening terrain obstructions.”⁹

The NAB gives examples of such translator usage to supply fill-in coverage “in mountainous areas in Central Colorado” and “extend[ing] into neighboring communities in which signal delivery from full-service stations was not possible.”¹⁰ According to FCC definition and NAB examples, we would assume that the inner city has little or no use for translators. The center of a market—the city center—usually houses the market’s broadcast facilities. These areas are engulfed coverage well above 60 dBu with decent signal penetration. This directly relates to Section 5(2) of the LCMA (“such decisions are made based on the needs of the local community”), and the selection of the most suitable secondary broadcast service type in the core city. The needs of the local community in the city core at most times is not translator service, because full power broadcast signals are usually satisfactory there. The city core is in need of more hyper-local neighborhood programming that can’t be covered on a full power station since the full power station must be relevant to the entire market. The “core” market grid is thus appropriate based on the definition and the LCMA.

- 3) **NAB’s rationale for implicating outlying existing LPFM service outside the 30 x 30 grid study area is misleading.** NAB draws attention to the notion that communities around the edges of a city have LPFM uses, but the FCC’s proposed 30 x 30 grid only infers LPFM is mainly a suitable central-city service.¹¹

⁹ NAB Comment page 7, citing *Amendment of Part 74 of the Commission’s Rules Concerning FM Translator Stations*, Report and Order, 5 FCC Rcd 7212, 7219, (1990) *recon. denied and clarified*, 8 FCC Rcd 5093 (1993).

¹⁰ NAB Comment pages 7 and 8.

¹¹ NAB Comment page 12 “...LPFM stations and full-power stations using FM translators may be

NAB states “it is unclear why the Notice proposes to rely on the grid rather than the Commission’s standard Arbitron radio market definition.” The reason for a central city grid becomes apparent when taking engineering into consideration. The reason why NAB might count many LPFM stations at the edges of cities in multiple cities—but not in the central city—is because central city LPFM channels are scarce (while channel availability at the edges of cities is more prevalent) due to FCC station spacing rules. The NAB’s own example (cities with LPFM services only on the outskirts and not in the center) helps demonstrate why the FCC is proposing to ensure “core” market LPFM availability. The underlying rationale is that the city core has scarcer spectrum. If the measure of scarce spectrum is diluted by plentiful channel openings at the rural Arbitron market periphery, there will never be appropriate inner-city channels reserved for LPFM as directed by the LCMA.¹² NAB then goes on to draw more attention to licensed LPFMs than translators:

It is readily apparent that reliance on the arbitrary grid ignores both the currently licensed LPFM stations located within a radio market but outside the grid, and future LPFM opportunities outside the grid in many markets. As a result, the approach underestimates the sufficiency of LPFM opportunities in a market, and in turn, increases the number of markets where all pending translator applications will be dismissed.¹³

What NAB fails to mention is that the FCC is also not additionally viewing the licensed translators. NAB mentions the metro areas of Portland (OR), Chicago, Sacramento, Gainesville, and Austin in its Comment, drawing attention

located in and compete for audiences across entire markets, and not just within the designated grid area...”

¹² LCMA Section 5.

¹³ NAB Comment, Page 11.

to how many LPFMs exist outside the core metro. If we also look at the existing licensed translators in those areas, the data together paints a different picture:

<u>Metro¹⁴</u>	<u>LPFM</u>	<u>Translator</u>	<u>Process/No Process</u>
Portland	4	16	No Process
Chicago	6	23	No Process
Sacramento	5	11	Process
Austin	3	15	No Process
Gainesville	6	5	Process

In four out of the five metros NAB mentions, translators vastly outnumber LPFM service, when the entire market is considered. NAB also excludes *where* translators may be serving audiences within the metro. For example, considering Austin, TX, NAB states:

NAB submits that there is no reason to exclude the three existing LPFM stations already serving the Austin market from these calculations. These stations undoubtedly contribute to LPFM service in Austin and should be counted, as they would be under a mechanism that relied on the Arbitron metro market definition.¹⁵

However, NAB does not mention that nine translators serve the Austin central city, while no LPFM serves the same area.¹⁶ In Portland, eight translators serve the central city, while no LPFM serves the same area.¹⁷ In the big picture, NAB might be inadvertently setting up an argument to open more markets for LPFM.

NAB claims that their system “will improve the precision of any determination about the balance between LPFM and FM translator opportunities in a market.”¹⁸ But as

¹⁴ Portland, Or radius 60 km, Chicago, IL, radius 85 km, Sacramento, CA radius 60 km, Gainesville, FL radius 55 km, Austin, TX radius 60 km,

¹⁵ NAB Comment, Page 14.

¹⁶ K215FD, K236AY, K246BD, K253AN, K259AJ, K274AX, K276EL, K287AY, K293BF

¹⁷ K220IN, K228EU, K240CZ, K242AF, K272EL, K274AR, K283BL, K296FT

¹⁸ NAB Comment page 15.

seen above, this claim is not based on any pragmatic rationale other than that the FCC has traditionally used Arbitron markets in the past.

C. NAB Comment Regarding The FCC Not Dismissing Pending Translators Where No Current LPFM Opportunities Currently Exist¹⁹

NAB prescribes allowing translator processing to take precedence if studies based upon current LPFM spacing (engineering) methodology concludes no channels available:

In eighteen markets where the Commission proposes to dismiss all pending translator applications, NAB has established that, in all but five of these markets, there would be no available channels for LPFM stations. Since dismissing the pending translator applications would not result in the licensing of any LPFM stations in those markets, translator applications in those markets should continue to be processed.²⁰

However, NAB goes on to explain that these same channels may be open to LPFM with second-adjacent waivers. This should not matter at the *current time*:

The fact that an LPFM applicant might seek a second-adjacent channel distance separation waiver in these markets sometime in the future is not a reason to prevent processing of translator applications that do comply with the Commission's rules. The Commission has not begun a proceeding to consider waiver standards for LPFM under Section 3(b)(2), and the public interest would not be served by further delaying service to the public from FM translators while the Commission considers the standards for granting LPFM waivers.²¹

CFI believes NAB's reasoning is somewhat dubious. Essentially they insinuate that it is not in the public interest to delay translator processing for a couple of months in order for the FCC to derive second-adjacent waiver standards for LPFM. However, since the LCMA has already codified second-adjacent waivers, we can safely infer that the FCC will reciprocate in a timely manner with the creation of regulation, and there is

¹⁹ NAB Comment, "B" page 15.

²⁰ NAB Comment pages 15 (bottom) and page 16 (top).

²¹ NAB Comment pages 16-17.

no waiting. With these waivers, pending anticipated regulatory changes, LPFM facilities can, (for the most part), be placed wherever translators can be placed. NAB's comment is thus moot.

D. NAB Comment Regarding “The Commission Should Process Pending Translator Applications if the Number of Locations ‘Available’ for LPFM Exceed the Proposed Floor”²²

NAB explains that since open channels in metro studies can sometimes accommodate more than one licensed facility on the FCC's core study grid, more channel openings actually exist in certain markets, surpassing the minimum reservation of channels for the metro. Thus, a market could be flipped from “no process” to “process” for translators in a number of instances. CFI believes NAB is attempting to parse LPFM channels into theoretical availabilities instead of realistic availabilities.

The FCC 30 x 30 grids can be arranged strategically to recycle LPFM co-channels towards opposite ends of the grid in theoretical formation (24 km for co-channel spacing). But this is not how typical filing behavior occurs. If the grid is placed at the center of the market, most applicants will tend to aim somewhere within the confines of the chief population area—for example, a central 20 x 20 mile area.²³ In the roughly 35 x 26 mile (30 x 30 point area) confines, 20 x 20 represents about half of the total grid area. Outside the top markets, the other half of the grid area represents many areas that are uninhabited or undeveloped. No entity is bound to apply for these locations. This is coupled with the fact that applying for an open channel in the central city greatly reduces the availability for the channel to be “reused” again within the grid.

²² NAB Comment, “C” page 17.

²³ See Joint Comment of Prometheus Radio Project, Rec Networks, and Common Frequency, where it is shown that 20 x 20 point areas better approximate the population of cities.

Taking these points into consideration, the FCC's study better approximates real-world filing availability compared to the NAB's proposal.

E. NAB Comment Regarding “The Commission Should Permit Settlements in ‘Process All’ Markets to Propose Modified Facilities”²⁴

NAB believes that technical settlements can be accommodated for translator applicants because the combination of LPFM channel *locations* and *channels* allows more than ample opportunity for LPFM applicants in “process markets.”²⁵ CFI strongly disagrees. The availability of settlements negates the FCC's systemic approach to defining clear channel floors. Settlement opportunity provides for an open-ended scenario where translator applicants could effectively cherry-pick the best channels, leaving the channels at the edges of the grid-area for LPFM applicants. If the FCC is going to set a channel floor, we recommend that the FCC not allocate multiple grants for translator applicants, as this may weaken LPFM availability. The “channel floor” is a mere recommendation for *the minimum level* of LPFM channels to preserve during a specific round of filing. It should not be considered a maximum amount.

III. COMMENTS OF NPR

NPR's Comment submitted regarding the FNPRM begins by stating:

The specific proposal for resolving the outstanding FM translator applications favors future LPFM service at the expense of the proposed FM translator stations, in many respects unnecessarily and contrary to the needs of local communities.²⁶

NPR appears to make the general assessment that although there are “more than 900 public radio stations nationwide,”²⁷ it would still be contrary to the needs of

²⁴ NAB Comment, “D” page 20.

²⁵ *Ibid.* Read their comment concerning *location* and *channels*.

²⁶ NPR Comment, page 2.

²⁷ NPR Comment, Introduction.

local communities for the first urban community LPFM station to take licensing priority. This could imply NPR translator applications are more important. CF disagrees with this notion. The “channel floors” proposal—the primary focus of the FNPRM—is concerned with balancing service in *urban markets*. NPR is firmly established in the top 150 markets, with at times multiplicative radio service in metro areas. Taking into consideration NPR’s 900-plus stations, when it comes to the “decision” to be “based on the needs of the local community,”²⁸ it seems intuitive to conclude that the urban community’s *first need* is not something that is readily available and already well-established.

NPR additionally urges the Commission to contemplate an alternative approach to processing the applications for the Auction No. 83 backlog that appear to us to be too light-handed in ensuring open channels for future LPFM use:

- 1) NPR cites the economy, reductions in funding, the possibility of other coverage solutions found since 2003, and changed circumstances in general that broadcasters may not want to pursue pending translators.²⁹ This implies that there are some pending translator applications that applicants do not want. We do not think this is a viable conclusion. Even if an applicant no longer wanted a translator application, the future grant of an application would mean that the permittee could eventually sell the channel for upwards of \$100,000 in the current market. In fact, the economy and funding reductions at NPR stations could mean that newly-granted translators could be a revenue tool. What entity

²⁸ LCMA Section 5(2).

²⁹ NPR Comment, page 3.

would want to dispose of an application that could lead to cash upon assignment?

- 2) NPR proposes “Rather than treating all FM translator applications alike and dismissing or processing them on a market-by-market basis, the Commission should identify the smaller number of currently viable, bona fide FM translator applications.”³⁰ NPR appears to make the assumption that solely by weeding out the traffickers, ample spectrum would be freed-up. However, in fact, it appears that **seven of the top ten filers**—that is, the ten filers who have the most translator applications pending—**would not even be considered to be traffickers**.³¹ Some applicants simply want to develop large radio networks, and this could be at the expense of urban LPFM. NPR also fails to take into consideration the thriving speculator market for *translator leasing*.
- 3) NPR mentions that the FCC should “direct individual inquiries to those applicants which the Commission has reason to suspect have engaged in trafficking.”³² Although a laudable goal, this would require the scrutiny of over 700 individual applicants. Confirming that an applicant is a bona fide trafficker and charging that applicant, followed by the applicant seeking appeal, may take years. In the end, the FCC may not even conclude that there is substantive evidence against more than a handful of applicants. In addition, many applicants have not been

³⁰ NPR Comment, page 4.

³¹ The following applicants do not appear to be traffickers: (Applicant name [amount of applications pending]): ALELUYA CHRISTIAN BROADCASTING, INC. (76), CALVARY CHAPEL OF TWIN FALLS, INC. (154), COVENANT NETWORK (72), CSN INTERNATIONAL (71), EDUCATIONAL COMMUNICATIONS OF COLORADO SPRINGS, INC.(71), EDUCATIONAL MEDIA FOUNDATION (468), WAY-FM MEDIA GROUP, INC. (78).

³² NPR Comment, page 4.

granted translators yet. Future speculators could essentially change their names and lease translators to the highest bidder instead of selling.

- 4) NPR revives the case for an application-processing limit as “an important tool in reducing the FM translator backlog”.³³ The limit “would not have to be as strict as 10 applications per entity” but could “be significantly higher.”³⁴ However, the FNPRM, the FCC states that the ten application-processing cap already fails to fulfill the goals of the LMCA. Moreover, Common Frequency’s previously-submitted ex parte presentation demonstrates that a ten-cap itself could result in virtually the same amount of total translator frequencies being licensed in the top 150 markets, as would be licensed with no cap in place.³⁵ A capping system provides little-to-no solution to the LPFM/translator balance.
- 5) NPR stipulates that the FCC should “retain any FM translator application that would not obstruct any LPFM licensing opportunity that is ultimately identified” and “provide applicants with pending translator applications that may obstruct a future LPFM station an opportunity to resolve the conflict, either through a settlement with other pending FM translator applicants, by modifying its proposed facilities, or by a combination of the two.”³⁶ First, in the overall conclusion of the LPFM rulemaking process, we would expect the FCC to allow LPFM to utilize contour-based methodology for licensing.³⁷ This would essentially, ultimately

³³ NPR Comment, page 5.

³⁴ NPR Comment, pages 5-6.

³⁵ See ECFS under Docket 99-25: CF Comment Regarding Top 150 Market "Ten Cap" Simulation (September 27, 2010).

³⁶ NPR Comment, page 7.

³⁷ See para. 83 of *Third Report and Order and Second Further Notice of Proposed Rulemaking of Creation of A Low Power Radio Service*, MM Docket No. 99-25: FCC stated that it “tentatively

allow for 1:1 technical preclusion for either service, negating the proposed NPR concept. What is then additionally described by NPR is a very legally and technically burdensome system of client-engineers and lawyers working through the thousands of translators buried in MXs—one case at a time—while respecting *theoretical* LPFM openings. This is significantly beyond the scope of what the FCC engineering and legal staff is equipped to deal with.

NPR's five points for alternative means for translator processing seem to do very little to confront the fact that pending translators currently block LPFM opportunities in urban markets, and that any translator processing regimen outside of a market-by-market approach could result in asymmetrical licensing in each city.

IV. CFI SUPPORTS A BALANCE OF LEGITIMATE TRANSLATOR USAGE AND LPFM

CFI supports a balance of translators and LPFM where each service is needed. CFI believes that in highly urbanized areas there is a need for additional community broadcast service in the form of LPFM. In rural and smaller communities, there is additionally a need for LPFM, but also translator service. A good demonstration for the need of justified translator service is supplied in a comment by KWMR (West Marin Community Radio). KWMR primarily serves a rural/small town population area with community, non-commercial educational radio service. In cases like these where 1) the broadcast entity is local, and participates a great deal in localism, 2) non-commercial, 3) outside the 30 x 30 grid, 4) has a pending *singleton* translator, 5) the translator applicant is the same as the station it intends on re-broadcasting, and 6) the pending translator

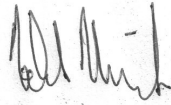
conclude[s] that the licensing of LPFM stations pursuant to the standards of Section 74.1204 of the Rules or some other 'contour-based' methodology is in the public interest."

does not preclude urban licensing opportunities, we believe this amounts to a positive use for a translator grant.

V. CONCLUSION

CFI currently believes the best policy for resolving the pending translators for the Auction No. 83 backlog is to utilize the channel floor proposal outlined in the FNPRM. Recommendations of certain established broadcast entities and broadcast associations either have too many contingences to allow for timely straightforward translator processing, or do not fully subscribe to the intentions of the LCMA to protect future LPFM viability.

Respectfully Submitted,

A handwritten signature in dark ink, appearing to read 'Todd Urick', is positioned above the printed name and title.

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